

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Maynerd Rauk
Union Cooperative Association
P.O. Box 107
Evansville WI 53536

PECFA Claim #53536-1413-10
Hearing #01-378

FINAL DECISION

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed December 3, 2001, under §101.02(6)(e), Wis. Stats., and §Comm 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was held on July 31, 2002 at 201 West Washington Street, Madison, Wisconsin.

The issue for determination is whether the Department's decision dated November 26, 2001 was incorrect with regard to the items identified in the Petitioner's appeal filed on December 12, 2001.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Maynerd Rauk
Union Cooperative Association
P.O. Box 107
Evansville WI 53536

Department of Commerce
PECFA Bureau

201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: John A. Kisiel
Department of Commerce
201 W. Washington Ave., Rm 322A
PO Box 7838
Madison WI 53707-7838

The authority to issue a proposed decision in this matter has been delegated to the undersigned by order of the Secretary dated July 2, 2002. The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

1. At all times material, Maynerd Rauk (hereinafter the “Appellant”) was the legal owner of the premises located at 110 E. Church Street, Evansville, Wisconsin.
2. On or before August 10, 2001, the Appellant filed a claim for reimbursement of expenses associated with site cleanup for the premises described in Paragraph 1 in the total amount of \$169,615.66 with the Wisconsin Department of Commerce, (hereinafter the “Department”).
3. On November 26, 2110 the Department made reimbursement in the amount of \$166,808.85.
4. The Department denied reimbursement for the following costs:
 - a. \$900.00 in performance bond charges, and
 - b. \$234.75 in interest associated with said performance bond.

5. The Appellant timely appealed the Department's denial of the above costs.
6. BT2 served as environmental consultant to the Appellant.

D I S C U S S I O N A N D C O N C L U S I O N S O F L A W

1. Procedural Matters.

At the outset of the hearing, the Attorney representing the Department sought to have the matter dismissed based upon the Appellant's untimely notification of its representative and untimely exchange of documents. The Administrative Law Judge noted the Department's objection for the record, but overruled it finding that the Department was not unduly prejudiced by the Appellant's delay.

The Attorney for the Department also objected to numerous documents the Appellant, through its representative John B. Tweddale, sought to admit into the record. The Administrative Law Judge disallowed settlement information and John B. Tweddale's Affidavit in Support of Petitioner because of the hearsay nature of information contained therein.

The Administrative Law Judge allowed into evidence a telephone record summarizing an inquiry made by a hydro geologist employed at BT2 to the PECFA Bureau Administrator regarding the eligibility of performance bond costs under the PECFA reimbursement program. Noting that the telephone record could, with proper authentication, come within the business record exception to hearsay rules, the Administrative Law Judge advised the parties that she would determine, after all evidence was introduced, the evidentiary weight the telephone record would be given.

In making both rulings, the Administrative Law Judge relied on Pieper Elec., Inc. v. Labor and Industry Review Comm., 346 N.W. 2d 464, 118 Wis. 2d 92 (1984), holding that rigid application of evidentiary rules runs contrary to administrative procedures.

2. Substantive Issues.

The Appellant through its representative testified credibly that between 1995-1998, the Department had reimbursed costs for performance bonds on claims submitted for reimbursement by BT2. The Appellant's representative also credibly testified that because the Department had not issued a definitive statement regarding the eligibility of performance bond cost reimbursements, the Appellant's consultant contacted the Department to determine the latter's policy regarding this type of expense. Given that the Department, at least with respect to cost submissions made by BT2, reimbursed performance bonds, this Administrative Law Judge used as additional evidence the telephone record introduced over the Department's hearsay objection, to determine that the Appellant reasonably relied on the Department's past practice when it incurred the performance bond cost at issue presently.

The Department argues that performance bond costs are not integral to the remediation process and thus fall within the eligibility exception defined by Comm 47.30(2)15. The Administrative Law Judge notes that the Department's interpretation of its rules and regulations should be accorded great weight (see, Irby v. Bablitch, 489 N.W. 2d 713, 170 Wis.2d 656 (1992)) and defers to the Department's characterization of this cost as one associated with, but not integral, to the remediation process.

Despite this deference, principles of fairness also apply. As the Department's witness testified, eligibility determinations are made according to an interpretation of the relevant Wisconsin statutes, Departmental regulations, appeal decisions, PECFA policy statements and PECFA program updates. The Department's witness further testified that none of these sources specifically address eligibility of performance bond costs.

In this instance, the Appellant had no way of knowing the Department's position on reimbursements for performance bond costs other than through its direct dealings with the Department. This Appellant incurred the cost at a time when the Department was typically reimbursing the performance bond costs submissions made by BT2. The Department not only advised BT2 that it would reimburse for these costs, it in fact regularly did. As soon as the Appellant's consultant was put on notice by the Department that performance bonds might no longer be reimbursable, BT2 advised its clients accordingly.

The Department sought to prevent introduction of evidence illustrating the Department's past practice regarding claims made by other BT2 consultants because of the information's "chilling" prejudicial effect. To support its position at the hearing, the Department also tried to suggest that the Appellant's reliance on such "persuasive" information was neither reasonable nor probative. Such an argument not only contradicts the Department's reasons for excluding its past behavior as unduly prejudicial, but also effectively nullifies this and other claimants' ability to rebut a departmental determination when no other interpretative information regarding the eligibility of costs is available. The Department's accountability to the PECFA program goes beyond an ad hoc implementation of applicable rules and regulations. Some degree of

predictability and equity should be afforded property owners as they engage in PECFA's remedial process.

DECISION

Because the Department reimbursed this cost to claimants represented by BT2 in the past, and because the Appellant reasonably relied on said practice, the Department shall reimburse the claimant's performance bond cost and associated interest amount.

Dated: _____

Mari A. Samaras-White
Administrative Law Judge
Department of Commerce
PO Box 7970
Madison WI 53707-7970

Copies to:

Maynerd Rauk
Union Cooperative Association
P.O. Box 107
Evansville WI 53536

By: John B. Tweddale, P.G.
BT2 inc.
2830 Dairy Drive

Madison, WI 53718-6751

John A. Kisiel
Department of Commerce
201 W. Washington Ave., Rm 322A
PO Box 7838
Madison WI 53707-7838

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REQUEST FOR REHEARING/JUDICIAL REVIEW

Hearing #01-378
Commerce # 53536-1413-10

Request for New Hearing

Petitions for new hearings must be received no later than 20 days after the mailing date of this hearing decision.

If, after you receive the decision, you believe it was based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. **To ask for a new hearing**, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Your request must explain why you believe the hearing examiner's decision is wrong. If you have new evidence to submit, you must describe your new evidence and explain why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or on the discovery of new evidence which could not have previously been obtained through due diligence on your part, your request will be denied.

The petition for new hearing must also be sent or faxed to all other parties named in this decision as "PARTIES IN INTEREST." **Late requests cannot be granted.** The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on all other parties named as "PARTIES IN INTEREST". **Late requests cannot be granted.** The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

Parties in Interest:

Maynerd Rauk
Union Cooperative Association
P.O. Box 107
Evansville WI 53536

By: John B. Tweddale, P.G.
BT2 inc.
2830 Dairy Drive
Madison, WI 53718-6751

John A. Kisiel
Assistant Legal Counsel
Office of the Secretary
Department of Commerce

Date Mailed: _____

Mailed By: _____